No. 90-1566

FILED
APR 11 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JONATHAN W. DUNCAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

ROBERT FABRIKANT *
FRED D. HEATHER
MARGARET M. ANTINORI
MCKENNA & CUNEO
1575 Eye Street, N.W.
Suite 800
Washington, D.C. 20005
(202) 789-7500

ARTHUR BARENS
10209 Santa Monica Blvd.
Los Angeles, CA 90067
(213) 557-0444

* Attorney of Record

Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether a second section 2255 motion raising new grounds for relief can be dismissed as an "abuse" of the motion remedy where all the facts necessary to support the new grounds were known to petitioner at the time petitioner prosecuted his initial section 2255 motion, absent a finding that petitioner's failure to include those grounds in his initial motion constituted a deliberate bypass of the section 2255 motion remedy?

2. Whether a second section 2255 motion raising new grounds for relief can be dismissed as an "abuse" of the motion remedy where the finding that a lay petitioner had all the facts necessary to support the new grounds at the time he prosecuted his initial section 2255 motion is based solely upon his presence at the court proceeding from which the new claims arose and for which a transcript was not available prior to the filing of the initial section 2255 motion, and the new claims relate solely to a failure by the district court to comply with Constitutional and other legal requirements?

PARTIES BELOW

The following were parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit, the court whose judgment is sought to be reviewed:

Jonathan W. Duncan
United States of America

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES BELOW	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. Overview	3
B. The Deportation Proceedings	9
C. The Initial Section 2255 Motion	9
D. The Second Section 2255 Motion	11
REASONS FOR GRANTING THE WRIT	14
I. THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THE STANDARDS APPLICABLE TO THE DETERMINATION OF WHETHER A NEW-CLAIM SUCCESSIVE MOTION SHOULD BE DISMISSED ON ABUSE GROUNDS	14
A. This Court Enunciated A Subjective Standard To Govern Dismissals Of New-Claim Successive Motions On "Abuse" Grounds	14
B. Congress Codified In Rule 9(b) The Subjective Standard For Determining Abusive Petitions Enunciated By This Court	17

TABLE OF CONTENTS—Continued

Page

C. Accepted Doctrine Regarding New-Claim Successive Motions Utilizes A Subjective Standard For Determining Abuse 19

II. THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THE CIRCUMSTANCES UNDER WHICH KNOWLEDGE MAY REASONABLY BE IMPUTED TO A LAY PETITIONER AS PART OF A DETERMINATION THAT A NEW-CLAIM SUCCESSIVE MOTION IS ABUSIVE 22

CONCLUSION 26

APPENDICES

APPENDIX A

Judgment Of The Eleventh Circuit Court Of Appeals Affirming District Court's Dismissal Of Second Section 2255 Motion 1a

APPENDIX B

Order Of The United States District Court For The Northern District Of Georgia Dismissing Second Section 2255 Motion 2a

APPENDIX C

Judgment Of The Eleventh Circuit Court Of Appeals Affirming The Deportation Order And The District Court's Denial Of Initial Section 2255 Motion 4a

APPENDIX D

Order Of The United States District Court For The Northern District Of Georgia On Remand Denying Initial Section 2255 Motion 6a

TABLE OF CONTENTS—Continued

APPENDIX E Page

Judgment Of The Eleventh Circuit Court Of Appeals Vacating The District Court's Denial Of The Initial Section 2255 Motion And Remanding For Evidentiary Hearing 14a

APPENDIX F

Order Of The United States District Court For The Northern District Of Georgia Denying Initial Section 2255 Motion 17a

TABLE OF AUTHORITIES

CASES — Page

Argersinger v. Hamlin, 407 U.S. 25 (1972) 23
Burnside v. White, 760 F.2d 217 (8th Cir.), *cert. denied*, 474 U.S. 1022 (1985) 20
Davis v. United States, 417 U.S. 333 (1974) 16, 20
Fay v. Noia, 372 U.S. 391 (1963) ..... *passim*
Francis v. Henderson, 425 U.S. 536 (1976) 16
Hardy v. United States, 375 U.S. 277 (1963) 24, 25
Harris v. Pulley, 885 F.2d 1354 (9th Cir. 1988), *cert. denied*, 110 S. Ct. 854 (1990) 19
Hill v. United States, 368 U.S. 424 (1962) 5-6
Humphrey v. United States, 766 F.2d 1522 (11th Cir. 1985) 24
Johnson v. Copinger, 420 F.2d 395 (4th Cir. 1969) 19
Johnson v. Zerbst, 304 U.S. 458 (1938) 16
McCarthy v. United States, 394 U.S. 459 (1969) 5
Nell v. James, 811 F.2d 100 (2d Cir. 1987) 19-20
Paprskar v. Estelle, 612 F.2d 1003 (5th Cir.), *cert. denied*, 449 U.S. 885 (1980) 17
Potts v. Zant, 638 F.2d 727 (5th Cir.), *cert. denied*, 454 U.S. 877 (1981) 21
Price v. Johnston, 334 U.S. 266 (1948) 14, 16, 17
Richmond v. Ricketts, 774 F.2d 957 (9th Cir. 1985) 20
Robinson v. Fairman, 704 F.2d 368 (7th Cir. 1983) 17, 19
Rose v. Lundy, 455 U.S. 509 (1982) 19
Salinger v. Loisel, 265 U.S. 224 (1924) 14
Sanders v. United States, 373 U.S. 1 (1963) ..... *passim*
Santobello v. New York, 404 U.S. 257 (1971) 5
Townsend v. Sain, 372 U.S. 293 (1963) 15, 16, 17
United States v. Brumley, 560 F.2d 1268 (5th Cir. 1977) 24
United States v. Frady, 456 U.S. 152 (1982) 15
United States v. Hayman, 342 U.S. 205 (1952) 20
United States v. Selva, 559 F.2d 1303 (5th Cir. 1977) 24, 25
United States v. Timmreck, 441 U.S. 780 (1979) 5
Wainwright v. Sykes, 433 U.S. 72 (1977) 16, 23
Williams v. Holbrook, 691 F.2d 3 (1st Cir. 1982) 20
Wong Doo v. United States, 265 U.S. 239 (1924) 14

TABLE OF AUTHORITIES—Continued

STATUTES	Page
8 U.S.C. § 1251(a)(11)	9
18 U.S.C. § 2	4
21 U.S.C. § 843(b)	4
28 U.S.C. § 753(b) (1988)	24
28 U.S.C. § 1254(1) (1988)	1
28 U.S.C. § 2254 (1988)	8
28 U.S.C. § 2255 (1988)	2, 3
28 U.S.C. § 2255, Rule 9(b) (1988)	18
OTHER AUTHORITIES	
Fed. R. Crim. P. 11	4, 5
Fed. R. Crim. P. 11(e)(2)	4
Fed. R. Crim. P. 44(c)	4
Rules Governing Section 2255 Proceedings in the United States District Courts	
Rule 2(b)	23
Rule 9(b)	*passim*
122 Cong. Rec. H30,217 (daily ed. Sept. 14, 1976)	18
H.R. Rep. No. 1471, 94th Cong., 2d Sess. 6, *reprinted in* 1976 U.S. Code Cong. & Admin. News 2478	18
Communication from the Chief Justice of the United States, H.R. Doc. No. 464, 94th Cong., 2d Sess. 77 (1976)	17, 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. ——

JONATHAN W. DUNCAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

Petitioner Jonathan W. Duncan ("Petitioner") respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The District Court's order dismissing Petitioner's second section 2255 motion as abusive is unreported, but is reproduced herein as Appendix B at 2a. The Court of Appeals' judgment affirming the District Court's order is unreported, but is reproduced herein as Appendix A at 1a.

JURISDICTION

The judgment sought to be reviewed by writ of certiorari was dated and entered January 11, 1991. The statutory provision conferring jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C. § 2255 (1988) which provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.
>
> A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.
>
> The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.
>
> An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

This case also involves Rule 9(b) of the Rules Governing Section 2255 Proceedings in the United States District Courts ("Rule 9(b)"), which provides in pertinent part:

> **Rule 9. Delayed or Successive Motions**
>
> . . . .
>
> **(b) Successive motions.** A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

STATEMENT OF THE CASE

A. Overview

On November 27, 1989, Petitioner filed a second motion pursuant to 28 U.S.C. § 2255 ("section 2255") to vacate and set aside the sentence of four years probation imposed on him after he agreed to plead guilty to a narcotics-related charge. (R1-1).[1] In November 1984, Petitioner and his fiancee, Beth Ellen Chanin were charged in a two count narcotics indictment. (Record Excerpts—District Court Docket Sheet—1). On February 20, 1985, the Honorable Robert Vining accepted a guilty plea to a

---

[1] All references in parentheses are to the record on appeal in the Eleventh Circuit. Relevant orders and judgments are reproduced in the Appendices and are cited there for convenience.

one count information which charged that Petitioner and Ms. Chanin used a telephone in facilitating a drug conspiracy, in violation of 21 U.S.C. § 843(b) and 18 U.S.C. § 2. (Record Excerpts—District Court Docket Sheet—1). On July 30, 1985, Judge Vining suspended imposition of sentence and Petitioner was placed on probation for four years. (*Id.*—5 and 6).

Petitioner's second section 2255 motion raised the following four grounds for relief, none of which had been contained in his initial section 2255 motion filed on July 31, 1987: (1) that a violation of Fed. R. Crim. P. 11 occurred because of the District Court's wholesale failure to establish on the record a factual basis for the guilty plea; (2) that the guilty plea was entered involuntarily because the government insisted upon treating Petitioner and his then-wife as a "package deal", thereby coercing Petitioner to relinquish his entrapment defense and plead guilty in order that his wife receive probation, and then failed to inform the court of this condition of the plea agreement as required by Fed. R. Crim. P. 11(e)(2); (3) that Petitioner was denied effective assistance of counsel in violation of the Sixth Amendment because his counsel's representation was infected by an actual conflict of interest that was not disclosed to the District Court, and which was never knowingly and intelligently waived by Petitioner, as required by Fed. R. Crim. P. 44(c); and (4) that Petitioner's plea was inadequate as a matter of law because the District Court did not, in fact, elicit a plea of "guilty" from Petitioner to any of the charges lodged against him. These four grounds for relief were not raised in Petitioner's original section 2255 motion because the facts necessary to support grounds one and four above were unknown at that time, and as to the other grounds, Petitioner did not realize that facts of which he was aware provided legal grounds for section 2255 relief.

Petitioner's argument with respect to the first ground raised in the second motion, was that the District Court

had failed to comply with Fed. R. Crim. P. 11, which requires that a factual basis appear *on the record* in order for a guilty plea to be accepted by a district court. *Santobello v. New York*, 404 U.S. 257 (1971). This requirement contemplates that the essential elements of the crime be placed on the record, and that the defendant affirmatively admit on the record to having committed those acts. *McCarthy v. United States*, 394 U.S. 459, 467 (1969). It was only after reviewing the plea colloquy contained in the transcript of the plea proceeding, which was unavailable when Petitioner filed his initial section 2255 motion,[2] that Petitioner's counsel, who had not represented Petitioner at the earlier criminal proceedings, learned that the plea colloquy did not comply with Fed. R. Crim. P. 11 because the record did not contain the essential elements of the offenses charged or an admission of guilt by Petitioner. Accordingly, this ground was properly raised in the second section 2255 motion. Similarly, the existence of the fourth ground raised in the second section 2255 motion—that the plea was inadequate because the court never elicited a plea of guilty from Petitioner—was unknown until counsel obtained and reviewed the previously unavailable transcript of the plea proceeding.

The District Court's wholesale failure to comply with the requirements of Rule 11, moreover, is distinguishable from the type of technical noncompliance which will not justify collateral relief under section 2255. *See United States v. Timmreck*, 441 U.S. 780 (1979). In this case, the failures by the District Court were so egregious as to deny Petitioner the due process of law guaranteed him by the Constitution, resulting in a proceeding "inconsistent with the rudimentary demands of fair procedure." *Hill*

---

[2] It is undisputed that the transcript of Petitioner's plea colloquy was not available until May 9, 1988, well after Petitioner's first section 2255 motion was filed. (*See* Record Excerpts—District Court Docket Sheet—7). *See infra* note 4.

v. United States, 368 U.S. 424, 428 (1962). Counsel has been unable to find any reported case sustaining a conviction where a district court's failures have been so fundamental. Accordingly, collateral relief is available for Petitioner's Rule 11 claims, as they are not premised on the simple failure of the District Court to comply with the formal requirements of the Rule.

By order dated March 6, 1990, District Judge Vining directed the government to respond to Petitioner's second section 2255 motion. (R1-3). The government responded on April 24, 1990 (R1-5), and moved to dismiss the motion as an abuse of the section 2255 remedy. (R1-4). On May 11, 1990, Petitioner, through counsel, submitted a memorandum of law opposing the government's motion to dismiss. (R1-7).

By order dated May 18, 1990, Judge Vining found that Petitioner's second section 2255 motion constituted an abuse of the motion remedy and, hence, denied the motion. *See* Appendix B at 2a. The District Court did not reach the merits of the second section 2255 motion, dismissing it instead on the ground that the new bases for relief alleged should have been brought in the first section 2255 motion. *Id.* at 3a. The basis of the District Court's erroneous holding that Petitioner's second section 2255 motion constituted an abuse of the motion remedy was its finding that

> [Petitioner] was present at the *sentencing* and the transcript was later available to him; consequently, all of the facts necessary to support his new grounds were known to him at the time he prosecuted his appeal and at the time he filed his first motion pursuant to section 2255.

Id. (emphasis added).[3]

The District Court's finding erroneously imputes knowledge to Petitioner of all facts relevant to the four new

---

[3] The district court was mistaken in its belief that Petitioner had taken a direct appeal.

grounds for relief based solely on his presence at the sentencing proceeding, and his purported access to a transcript of that proceeding, which was, in fact, unavailable to Petitioner and his counsel when the initial section 2255 motion was filed.[4] This finding is erroneous, as a matter of law, for the further reason that two of the new claims arose out of the plea, not the sentencing, proceeding, and the transcript of the plea proceeding was indisputably unavailable prior to the filing of the initial section 2255 motion.[5] Most importantly, for the reasons discussed below, the court's finding of abuse is deficient as a matter of law because the court did not, indeed could not, find that Petitioner's failure to include any of these new grounds in his initial motion constituted a deliberate bypass of the section 2255 motion remedy.

On January 11, 1991, the Court of Appeals summarily affirmed the District Court's decision. *See* Appendix A at 1a.

---

[4] While the sentencing transcript is stamped as filed May 5, 1987, prior to the filing of Petitioner's first motion (*see* Record Excerpts—District Court Docket Sheet—6), Petitioner's new counsel on the initial section 2255 motion submitted an affidavit (the "Schwartz Affidavit") stating that he had unsuccessfully attempted to obtain both the plea and the sentencing transcripts prior to filing the original section 2255 motion. (*See* Schwartz Affidavit, R1-7-Exhibit A-¶ 7). Notwithstanding that the factual matters asserted in the Schwartz Affidavit were not controverted by the government, the lower courts did not address the matters asserted therein other than to reach a conclusion wholly, and inexplicably, at odds with the Schwartz Affidavit.

Petitioner was, of course, also present at the plea proceeding. Inexplicably, however, the District Court did not rely on his presence at that proceeding as a basis for finding that Petitioner was aware of all facts necessary to support any of the new grounds raised in the second motion at the time the first motion was filed. It is undisputed that the transcript of the plea proceeding was not available until May 9, 1988, well after Mr. Duncan's initial section 2255 motion was filed. (*See* Record Excerpts—District Court Docket Sheet—7).

[5] *See supra* note 4.

Petitioner now seeks recourse to this Court to clarify the standards used by lower courts to determine whether a successive section 2255 motion that raises new grounds for relief (a "new-claim successive motion") may properly be dismissed under Rule 9(b) as an abuse of the motion remedy.[6] This case presents an excellent opportunity for this Court to clarify the applicable standards because the lower courts, including the courts here, have grossly misapplied Rule 9(b) and have refused to reach the merits of countless section 2255 motions for reasons wholly at odds with the equitable principles enunciated by this Court, and codified when Congress enacted Rule 9(b). Because the proper administration of criminal justice requires that section 2255 motions be reached in a principled, consistent and equitable fashion, the Court should grant certiorari to address the important questions presented here.

The broad issue raised is whether, absent a finding that a petitioner deliberately withheld grounds from his initial section 2255 motion, a new-claim successive motion may be dismissed on abuse grounds simply because the petitioner had knowledge of all facts necessary to include the new grounds when he filed his initial section 2255 motion. A second, narrower issue is whether, for purposes of determining whether an abuse of the motion remedy has occurred, knowledge may be imputed to a lay petitioner based upon his presence at a court proceeding, where the transcript of that proceeding was not available prior to the filing of the initial section 2255 motion. In this case, Petitioner's mere presence at his *sentencing* proceeding was found sufficient to charge him with knowl-

---

[6] This Court's decision on the standards for "abuse" dismissals under section 2255 will also inform the "abuse" determination for habeas corpus motions under 28 U.S.C. § 2254 (1988). *Sanders v. United States*, 373 U.S. 1, 15 (1963) (no distinction between treatment of successive section 2255 motions and successive habeas corpus petitions (§ 2254)).

edge of legal and factual matters occurring at his *plea* proceeding, notwithstanding that the transcript of the plea proceeding was not available prior to filing the initial motion, that the new grounds in the second section 2255 motion arose out of the plea proceeding, and that neither Petitioner nor his counsel were in fact aware of the new grounds for relief at the time the first motion was filed. Petitioner submits that a new-claim successive motion may not, as a matter of law, be dismissed as abusive under these circumstances.

B. The Deportation Proceedings

Petitioner is a citizen of New Zealand who has been living in the United States as a permanent resident alien. *See* Appendix D at 6a. Petitioner did not initially encounter problems with the Immigration and Naturalization Service ("INS") because of his conspiracy conviction. However, as a result of a subsequent traffic-related charge, Petitioner's conviction was brought to the attention of INS. *Id.* at 9a. The INS instituted a deportation action and Petitioner discovered that his guilty plea, because it was considered a drug-related crime, made him automatically deportable. *See* 8 U.S.C. § 1251(a)(11).

Ultimately, Petitioner was ordered deported. Petitioner appealed to the Board of Immigration and Naturalization Appeals, which two months later dismissed his appeal. Having exhausted his administrative remedies, on August 13, 1987, Petitioner filed a Petition for Review with the Court of Appeals for the Eleventh Circuit (Appeal No. 87-8581).[7]

C. The Initial Section 2255 Motion

On July 31, 1987, Petitioner and his then-counsel Mr. Dale Schwartz, who had not represented Petitioner at the

---

[7] This appeal was ultimately consolidated with Petitioner's appeal from the District Court's denial of his initial section 2255 motion. *See* discussion *infra*.

plea or sentencing proceedings, filed a section 2255 motion seeking to set aside the sentence. Due to the pending deportation and to the court reporter's inability to locate the transcripts of Petitioner's plea and sentencing proceedings, it was necessary for Petitioner's initial section 2255 motion to be filed without a review of those transcripts.[8] The grounds raised in the initial section 2255, therefore, did not reflect those bases for relief that only a review of the transcripts would have revealed. On March 4, 1988, without having held an evidentiary hearing, the District Court denied Petitioner's original section 2255 motion. *See* Appendix F at 17a-18a. Petitioner then appealed the District Court's denial of the original section 2255 motion to the Eleventh Circuit. (Exhibit—Notice of Appeal).

On January 3, 1989, the Eleventh Circuit issued an order addressing the deportation and section 2255 appeals, which had been consolidated. *See* Appendix E at 14a. The court remanded the matter to the District Court, ordering it to conduct an evidentiary hearing addressing Petitioner's allegations of ineffective assistance of counsel. *Id.* at 16a. The District Court, after conducting an evidentiary hearing, concluded that Petitioner had chosen to plead guilty with knowledge that there was a possible risk of triggering a deportation inquiry, and, therefore, denied the first section 2255 motion. *See* Appendix D at 6a, 13a.

The parties then filed supplemental briefs with the Eleventh Circuit in light of the District Court's order on remand. *See* Appendix E at 16a. Petitioner's counsel raised three new arguments in the supplemental brief: (1) lack of a factual basis on the record for the guilty plea; (2) involuntariness of the guilty plea because it was a "package deal"; and (3) insufficiency of the guilty plea. (R1-7—Exhibit B). The three new grounds for re-

---

[8] *See supra* note 4.

lief became apparent only after the court reporter located, and Petitioner's counsel obtained, the transcript of Petitioner's plea proceeding.[9] The government moved to strike those new issues. The appeals court did not rule on the government's motion to strike.

On April 21, 1989, both the deportation order and the denial of the original section 2255 motion were affirmed by the Eleventh Circuit. *See* Appendix C at 4a-5a. On June 9, 1989, a petition for rehearing and rehearing *en banc* was denied by the Eleventh Circuit Court of Appeals.

D. The Second Section 2255 Motion

Approximately five and one-half months after the Eleventh Circuit's ruling on the first section 2255 motion and the order of deportation, Petitioner, represented by new counsel, filed his second section 2255 motion. (R1-1). The second section 2255 motion raised four new grounds for relief, two of which related solely to Constitutional and other violations of law which occurred at the plea proceeding. Following the District Court's order to respond to Petitioner's second section 2255 motion (R1-3), the government moved to dismiss it and affirmatively pled abuse of the motion remedy. (R1-4).

Petitioner opposed the government's motion on the ground that two of the new grounds, allegations relating to the inadequacy of the factual basis for the guilty plea and the insufficiency of the guilty plea, were not raised in the earlier motion because the transcript of the plea proceeding which revealed these grounds was not available until after the initial section 2255 motion had been

---

[9] Petitioner's counsel on the first section 2255 motion, expressly notified the Eleventh Circuit of the prior unavailability of the transcripts in a footnote to the supplemental brief. (*See* Exhibit—Supplemental Brief of Petitioner—Appellant, Jonathan W. Duncan, filed April 10, 1989, in consolidated brief before the Eleventh Circuit, n.2, at 2).

filed. (R1-7-2).[10] Petitioner's reasons for not bringing these grounds earlier were supported by an affidavit from his counsel who had prepared the first section 2255 motion (the "Schwartz Affidavit"), and with references to the record. In the Schwartz Affidavit, Petitioner's counsel states:

> In July, 1987, at the time I filed petitioner's original § 2255 motion, I was unaware of facts supporting the grounds currently raised in petitioner's second § 2255 motion. Compelling reasons exist for the failure to assert these new grounds earlier since the transcripts which revealed two of these grounds were unavailable and the proceeding which exposed the other two grounds had not yet taken place.
>
> In July, 1987, at the time I filed the original § 2255 motion, the court reporter could not locate the transcripts of petitioner's plea colloquy and sentencing hearing. I specifically notified the court and opposing counsel of this fact . . . . Therefore, I was unable at that time to determine whether a factual basis for [petitioner's] plea appeared on the record or whether the plea elicited was sufficient, two grounds currently advanced in petitioner's second § 2255 motion.

(R1-7—Exhibit A-¶¶ 7-8).

Notwithstanding Petitioner's uncontroverted explanation for his inability to raise, in his first section 2255 motion, the claims relating to the Constitutional and other legal deficiencies in the plea proceeding, the District Court found that simply because Petitioner was present at the *sentencing proceeding* and the transcript of that proceed-

---

[10] Petitioner also cited the absence of the sentencing transcript as a reason for his lack of knowledge at the time the initial section 2255 motion was filed. The sentencing transcript did not (indeed, could not), however, contain information that would cure the Constitutional and procedural violations which had transpired during the plea proceedings, which occurred more than five months before the sentencing proceeding.

ing was later available to him, the facts necessary to support his new grounds for relief were known to him at the time he filed his initial section 2255 motion. *See* Appendix B at 3a. Thus, the District Court imputed knowledge to Petitioner based solely on his presence at the sentencing proceeding and his having access to a transcript of that proceeding, notwithstanding that two of the new claims related solely to the plea proceeding, for which a transcript was indisputably unavailable prior to the initial section 2255 motion, that Petitioner is a layman, that Petitioner (and his counsel) denied having had access to (or possession of) the plea (and sentencing) transcript(s) prior to filing the initial section 2255 motion,[11] and that the new grounds related solely to a failure by the District Court to comply with Constitutional and other legal requirements.

Without making any findings as to how Petitioner's presence at the sentencing proceeding and putative access to the transcript of that proceeding provided Petitioner with knowledge of section 2255 claims relating to Constitutional and other legal deficiencies in the plea proceeding, and without addressing Petitioner's documented explanation for his inability to raise these grounds in the original section 2255 motion, the District Court concluded that Petitioner had "failed to prove by a preponderance of the evidence that he was ignorant of the facts necessary to support his new grounds" when the first section 2255 was filed. Appendix B at 3a. On this basis alone, the District Court dismissed the second section 2255 motion as an abuse of the motion remedy. *Id.* The Eleventh Circuit, thereafter, summarily affirmed the judgment of the District Court. *See* Appendix A at 1a.

---

[11] *See supra* note 4.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THE STANDARDS APPLICABLE TO THE DETERMINATION OF WHETHER A NEW-CLAIM SUCCESSIVE MOTION SHOULD BE DISMISSED ON ABUSE GROUNDS

A. This Court Enunciated A Subjective Standard To Govern Dismissals Of New-Claim Successive Motions On "Abuse" Grounds

In *Sanders v. United States*, 373 U.S. 1 (1963), this Court addressed the problem of successive motions under section 2255, and formulated the "abuse of the writ" doctrine. In *Sanders*, this Court stated that a successive section 2255 motion alleging new grounds for relief, not previously adjudicated on the merits, could be summarily dismissed if the petitioner had abused the writ.[12] *Id.* at 17-19.

To determine whether a new-claim successive motion is abusive, *Sanders* directed the federal courts to apply

---

[12] The concept of dismissals for abuse was first enunciated by the Court in *Salinger v. Loisel*, 265 U.S. 224 (1924), a habeas corpus decision. Although the issue before the *Salinger* Court presented a successive petition alleging the same ground for relief, the Court stated that procedural rules may be applied to protect against abusive successive petitions alleging new grounds, as long as those rules are applied in accord with the principles underlying the writ. *Id.* at 232. In *Wong Doo v. United States*, 265 U.S. 239 (1924), the Court stated that where petitioner has deliberately abandoned a claim he had an opportunity to litigate in a hearing on a prior petition, such conduct warranted dismissal for abuse of the writ. *Id.* at 241. The Court indicated, however, that if petitioner has presented a reason for his failure to raise the claim earlier, this must be considered in deciding whether to dismiss for abuse. *Id.* *See also Price v. Johnston*, 334 U.S. 266, 291 (1948) (decided immediately before Congress enacted 1948 version of section 2255; successive litigation permissible "if for some justifiable reason [the petitioner] was previously unable to assert his rights or was unaware of the significance of relevant facts . . . .").

the historically established principles of equity jurisprudence:

> "[H]abeas corpus has traditionally been regarded as governed by equitable principles. *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 573 (dissenting opinion). Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks. . . ." Thus, for example, if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one . . . he may be deemed to have waived his right to a hearing . . . . The same may be true if, as in *Wong Doo*, the prisoner deliberately abandons one of his grounds at the first hearing. Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.

Id. at 17-18.

For further guidance in determining "abusive" petitions, the Court directed the lower courts to its simultaneous rulings in *Fay v. Noia*, 372 U.S. 391, 438-40 (1963), and *Townsend v. Sain*, 372 U.S. 293, 317 (1963), whose principles, the Court held, "govern equally here." *Sanders*, 373 U.S. at 18. *Fay* and *Townsend* provide a subjective test for determining whether a section 2255 applicant should be heard on the merits of a successive petition, *viz*, whether the petitioner "deliberately abandoned or bypassed" an opportunity to assert the claim in the earlier petition.[13]

---

[13] This Court has determined that the "deliberate bypass" standard no longer controls the determination of whether a petitioner is precluded from raising a claim, otherwise cognizable under section 2255, because of his failure to assert that claim properly in pretrial proceedings or at trial. *United States v. Frady*, 456 U.S. 152, 167-68 (1982). In *Frady*, the Court determined that the proper standard on a section 2255 motion for review of procedural defaults

Taking these three opinions together, the gravamen of the abuse of the writ doctrine is evident: the abuse doctrine is rooted in the concept of waiver. The test for whether a petitioner has waived his right to federal collateral relief is the deliberate bypass standard adopted by this Court in *Fay v. Noia*: there must be " 'an intentional relinquishment or abandonment of a known right or privilege.' " 372 U.S. at 439 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).[14]

In deciding whether an applicant has deliberately bypassed a claim, this Court in *Fay* admonished lower courts not "to introduce legal fictions" into the "abuse" analysis. 372 U.S. at 439. "At all events we wish it clearly understood that the standard here put forth depends on the *considered choice of the petitioner.*" *Id.* (emphasis added; footnote and citations omitted). In this regard, the *Townsend* Court, citing *Price v. Johnston*, stated "if for some justifiable reason [the petitioner] was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary

---

is the "cause and prejudice" standard enunciated in *Davis v. United States*, 411 U.S. 233 (1973), and later confirmed and extended in *Francis v. Henderson*, 425 U.S. 536 (1976) and *Wainwright v. Sykes*, 433 U.S. 72 (1977). Because the instant case does not involve a procedural default, it is governed by the "deliberate bypass" standard, not the "cause and prejudice" standard.

[14] *Sanders* cites *Fay v. Noia* as furnishing the controlling standard for determining abuse. 373 U.S. at 18. Similarly, in *Townsend*, the Court referenced *Fay* as the governing standard, stating:

> If, for any reason not attributable to the inexcusable neglect of petitioner, see *Fay v. Noia*, *post*, p. 438 (Part V), evidence crucial to the adequate consideration of the . . . claim was not developed . . . a federal hearing is compelled. The standard of inexcusable default set down in *Fay v. Noia* adequately protects the legitimate state interest in orderly criminal procedure, for it does not sanction needless piecemeal presentation of . . . claims in the form of deliberate by-passing of . . . procedures.

372 U.S. at 317.

nor reasonable to deny him all opportunity of obtaining judicial relief." *Townsend*, 372 U.S. at 317 (citing *Price*, 334 U.S. at 291). This Court, therefore, settled on a subjective, volitional standard to govern the determination of whether a successive motion raising new grounds for relief should be dismissed as abusive. The Court's decision to base abuse dismissals on a petitioner's intent, not simply his knowledge (actual or imputed) of the factual and legal basis of section 2255 claims, establishes an exceedingly high threshold for dismissing a new-claim successive motion on abuse grounds.

The *Sanders* court also stated that its guidelines for a finding of abuse were necessarily "[n]arrowly circumscribed" so that they conformed with the writ's historical role as an "effective and imperative remedy" in all cases of unconstitutional detention and with the Court's prohibition against procedurel doctrines that result in a forfeiture of constitutional claims. 373 U.S. at 17-18 (citing *Fay v. Noia*, 372 U.S. at 438). Accordingly, courts have recognized that only "rare and extraordinary" circumstances warrant dismissal based on a finding of "abuse". *Paprskar v. Estelle*, 612 F.2d 1003, 1007 (5th Cir.), *cert. denied*, 449 U.S. 885 (1980). *See also Robinson v. Fairman*, 704 F.2d 368, 370 (7th Cir. 1983).

B. Congress Codified In Rule 9(b) The Subjective Standard For Determining Abusive Petitions Enunciated By This Court

Responding to a recognized need for a uniform set of rules, this Court, on April 26, 1976, sent Congress proposed rules and forms to govern section 2255 proceedings.[15] Included in the proposed rules was Rule 9(b). As

---

[15] Communication From the Chief Justice of the United States, H.R. Doc. No. 464, 94th Cong., 2d Sess. 77 (1976) [hereinafter 1976 Communication] (emphasis in original). The Supreme Court also proposed a set of rules to cover section 2254 motions for state prisoners.

transmitted by the Court, this rule provided that a second or successive petition alleging new grounds for relief may be dismissed "if the judge finds that . . . petitioner['s failure] to assert those grounds in a prior petition *is not excusable.*" [16] The Court's proposed Rule 9(b), therefore, substituted "is not excusable" for the abuse of the writ language enunciated in *Sanders.*

Congress, however, rejected the Court's proposed Rule 9(b). Specifically, Congress stated that the Court's " 'not excusable' language created a new and undefined standard that gave a judge too broad a discretion to dismiss a second or successive petition." H.R. Rep. No. 1471, 94th Cong., 2d Sess. 6, *reprinted in* 1976 U.S. Code Cong. & Admin. News 2478, 2482 [hereinafter H.R. Rep. No. 1471]. Congress, thereafter, enacted its own Rule 9(b), which explicitly states that a successive petition may only be dismissed for "abuse." [17]

The legislative history of Rule 9(b) clearly indicates that Congress intended the subjective, waiver-oriented, "deliberate bypass" standard enunciated in *Sanders* to continue to govern the determination of abuse.[18] By explicitly rejecting the objective, and more stringent, "not excusable" standard, Congress revealed its unequivocal intention to limit dismissal of new-claim successive motions to the circumstances encompassed within the subjective, volitional, "deliberately withheld" and otherwise abusive formulations enunciated by the Supreme Court in *Sanders.*[19]

---

[16] 1976 Communication, *supra* note 15, at 98.

[17] *See* 28 U.S.C. § 2255, Rule 9(b) (1988).

[18] H.R. Rep. No. 1471, *supra.* In the House debate on the Rule, it was stated that Rule 9(b) had been amended " 'in order to conform the rule to existing statutory [§ 2244(b)] and case [*Sanders*] law.' " 122 Cong. Rec. H30,217-18 (daily ed. Sept. 14, 1976) (statement of Rep. Pepper).

[19] Since *Sanders,* the Court has not comprehensively addressed new-claim successive motions. Nonetheless, in 1982, most members

C. Accepted Doctrine Regarding New-Claim Successive Motions Utilizes A Subjective Standard For Determining Abuse

The rule governing new-claim successive section 2255 motions that was codified in 1948, authoritatively interpreted in 1963 and recodified in 1976 is as follows: Successive motions presenting new or different grounds for relief are permissible so long as they do not constitute "an abuse of the [section 2255] procedure". Rule 9(b). Abuse occurs if the petitioner either (i) deliberately withheld the newly asserted grounds from an earlier petition, or (ii) otherwise abused the writ because his "only purpose is to vex, harass, or delay." *Sanders*, 373 U.S. at 18. Thus, the simple failure to raise a claim, even a claim about which the petitioner possessed all necessary knowledge, does not suffice under Rule 9(b) to constitute abuse.[20]

---

of the Court identified *Sanders* as controlling new-claim successive motions. *Rose v. Lundy*, 455 U.S. 509, 521 (1982) (plurality opinion) ("Rule 9(b) incorporates the judge-made principle governing the abuse of the writ set forth in *Sanders v. United States*."). The Court, however, recently heard argument in *McCleskey v. Zant*, No. 89-7024, filed March 23, 1990, which presents the issue of the proper standard for finding abuse on a successive section 2254 petition. The Court's decision in *McCleskey* may well impact the issues presented here.

[20] *Robinson v. Fairman*, 704 F.2d 368, 370-71 (7th Cir. 1983) (quoting *Johnson v. Copinger*, 420 F.2d 395, 399 (4th Cir. (1969)) (Rule 9(b) does not impose "automatic and inflexible forfeiture on every habeas petitioner who, whether out of ignorance, inadvertence, or any other reasons, failed to assert every ground for relief available to him in his first appearance in a federal court"); *Johnson v. Copinger*, 420 F.2d at 399 (deliberate withholding "implies more than simply a failure to present a ground existing at the time of the previous petition"; "[a]s a minimum, the newly asserted ground must have been known to the petitioner at the time of his earlier petition"); *Harris v. Pulley*, 885 F.2d 1354, 1380 (9th Cir. 1988) (no abuse when petitioner missed identifying claim at time of first petition, because no conscious decision deliberately to withhold claim), *cert. denied*, 110 S. Ct. 854 (1990); *Nell v. James*, 811

The considerable discretion afforded the district court to consider or dismiss new-claim successive motions must be exercised in conformity with the equitable principles that undergird the "abuse" doctrine. *See Sanders*, 373 U.S. at 18-19. The flexibility inherent in the section 2255 remedy derives from the fact that it is the federal statutory analogue to the great common law writ of habeas corpus.[21] It is for this reason that principles of *res judicata* are inapplicable to section 2255 litigation. *Sanders*, 373 U.S. at 7. Rule 9(b) dismissals, therefore, are warrented only under circumstances which "justify the withholding of federal habeas corpus relief." *Fay*, 372 U.S. at 399. That this language connotes a strong presumption in favor of court's reaching the merits of a new claim successive motion is confirmed by *Fay*, where this Court determined that even the intentional and knowing failure not to raise a claim does not, by itself, constitute abuse.

In *Fay*, this Court faced the issue of whether a state prisoner's intentional failure to pursue his direct appeal in state court should bar his subsequent federal habeas

---

F.2d 100, 104-05 (2d Cir. 1987) (unreasonable to dismiss for abuse where petitioner is unaware of relevant facts affecting merits of petition, or if he knows them, his failure to appreciate their legal significance is justified); *Richmond v. Ricketts*, 774 F.2d 957, 960, 961 (9th Cir. 1985) (dismissal only if petitioner made conscious decision deliberately to withhold claims, is pursuing needless piecemeal litigation or has raised claims only to vex, harass, or delay); *Williams v. Holbrook*, 691 F.2d 3, 12-13 (1st Cir. 1982) (dismissal requires "truly bad faith conduct with respect to the manipulation of court processes"); *Burnside v. White*, 760 F.2d 217, 219-20 (8th Cir.) (Rule 9(b) dismissal inappropriate absent allegation that petitioner "deliberately failed" to raise new claim in earlier petition), *cert. denied*, 474 U.S. 1022 (1985).

[21] When Congress enacted section 2255 in 1948, it intended the new procedure to "afford federal prisoners a remedy identical in scope to federal habeas corpus." *Davis v. United States*, 417 U.S. 333, 343 (1974). *See also United States v. Hayman*, 342 U.S. 205 (1952) (section 2255 is as broad as habeas corpus, section 2254).

rights. In answering the question, the Court assumed that the petitioner there knowingly chose to forgo his right of direct appeal; however, because the choice was made to avoid the risk of a death sentence, the Court held: "Under no reasonable view can the State's version of [petitioner's] reason for not appealing support an inference of deliberate by-passing of the state court system." 372 U.S. at 439. Accordingly, knowing or intentional abandonment of a claim will not suffice to constitute "abuse" absent a finding that the petitioner's conduct was unjustified. *Accord Potts v. Zant*, 638 F.2d 727 (5th Cir.) (intentional waiver or abandonment of a claim cannot constitute per se abuse of the motion remedy; consideration must be given to reasons proffered by petitioner to justify conduct), *cert. denied*, 454 U.S. 877 (1981).

The result reached below is contrary to the decisions of this Court and to the legislative history underlying Rule 9(b). Even assuming that, as the District Court found, Petitioner had knowledge of all the facts necessary to support the new claims contained in the second motion when the original motion was filed, his failure to include those claims in the first motion does not, without more, constitute an abuse within the meaning of Rule 9(b). In addition to a failure to include all known claims in the original motion, abuse can be found to exist only where the omission reflected a deliberate bypass or a malevolent purpose. No such finding was made here.

II. THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THE CIRCUMSTANCES UNDER WHICH KNOWLEDGE MAY REASONABLY BE IMPUTED TO A LAY PETITIONER AS PART OF A DETERMINATION THAT A NEW-CLAIM SUCCESSIVE MOTION IS ABUSIVE

As noted above, the dismissal of Petitioner's second section 2255 motion was based on the District Court's finding that

> [Petitioner] was present at the sentencing and the transcript was later available to him; consequently, all of the facts necessary to support his new grounds were known to him at the time he prosecuted his appeal and at the time he filed his first motion pursuant to section 2255.

Appendix B at 3a. Thus, the lower courts imputed knowledge of the new claims to Petitioner based upon his presence at the sentencing proceeding and putative access to a transcript of that proceeding, which Petitioner and his then-counsel deny they were in possession of when the initial section 2255 motion was filed. The record is devoid of evidence contradicting these denials, or evidence that this transcript contained information that would have enabled Petitioner to include any of the new claims in the initial section 2255 motion.

The lower courts' finding that Petitioner's presence at, and purported access to the transcript of, the sentencing proceeding sufficed to charge him with knowledge of the facts underlying the four new claims, and therefore, with abusing the section 2255 remedy, is predicated on precisely the type of "legal fictions" denounced in *Fay*, 372 U.S. at 439, and is clearly at odds with the equitable principles enunciated in *Fay* and its progeny. There is, moreover, simply no basis in law or in fact for charging Petitioner, a lay person, with comprehending that court proceedings he attended were Constitutionally and legally deficient in a manner that furnished him with grounds

for section 2255 relief.[22] At bottom, the lower courts' rulings seek to hold Petitioner, a lay person, to a level of knowledge regarding the requirements of the Constitution and the Federal Rules of Criminal Procedure higher than that evidenced by the parties below, who were legally charged with assuring that those requirements were met. Imputing knowledge to a lay person in such circumstances renders entirely illusory the right to raise new-found claims in a successive section 2255 motion and saps the section 2255 remedy of its historical role and much of its practical value.

By imputing knowledge to Petitioner in the circumstances presented here, the District Court may have relied impliedly, and inadvertently, upon Rule 2(b) of the Rules Governing Section 2255 Proceedings ("Rule 2(b)"), which states, in pertinent part, that a section 2255 motion "shall specify all the grounds for relief which are available to the movant and of which he has or, by the exercise of reasonable diligence, should have knowledge . . . ." Thus, the District Court may have concluded that "by the exercise of reasonable diligence" a lay petitioner could have acquired the knowledge necessary to appreciate the Constitutional and other legal errors which transpired at a court proceeding he attended, particularly if he had access to a transcript of that proceeding. Assuming that the lower courts' rulings may be so rationalized, this would reflect an improper submerging of Rule 9(b) into Rule 2(b). In short, a failure to exercise reasonable diligence cannot, without more, constitute an abuse of the motion remedy within the meaning of Rule 9(b).

---

[22] As recognized by Chief Justice Burger in *Wainwright v. Sykes*, "the decision to assert or not to assert constitutional rights or constitutionally based objections . . . is necessarily entrusted to the defendant's attorney . . . [a]s a practical matter . . . '[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law' . . . ." 433 U.S. at 93 (Burger, C.J., concurring) (citing *Argersinger v. Hamlin*, 407 U.S. 25 (1972)).

An understanding of the legal significance of the omissions and commissions at issue here cannot be attributed to Petitioner until after the plea transcript became available. *See Humphrey v. United States*, 766 F.2d 1522 (11th Cir. 1985).[23] At that point, but not before, Petitioner through his counsel, would have the wherewithal to begin to comprehend the legal significance of what had transpired in District Court. At that point, but not before, could a lay petitioner, through his counsel, make legally cognizable arguments based on a record of what had transpired in District Court.

In the criminal context, a transcript "by shorthand, [or by] mechanical means" of "all proceedings in criminal cases had in open court" must be made. Court Reporter Act, 28 U.S.C. § 753(b) (1988). This Court has recognized that one of the purposes of providing access to transcripts of court proceedings is to allow *counsel* to prepare the issues on appeal. *See Hardy v. United States*, 375 U.S. 277 (1963); *United States v. Selva*, 559 F.2d 1303 (5th Cir. 1977); *United States v. Brumley*, 560 F.2d 1268 (5th Cir. 1977). Similarly, access to transcrips is critical to the successful prosecution of collateral attacks. An inability to access transcripts, therefore,

---

[23] In *Humphrey*, the Eleventh Circuit had appeared to recognize that before a new-claim successive motion could be dismissed as abusive, the record itself must be available for review. In *Humphrey*, the Eleventh Circuit considered an appeal from a dismissal of petitioner's third section 2255 motion. The court found that some of the new grounds raised were improperly denied as successive. The court stated that the record did not appear to show abuse on appellant's part with regard to the new claims based upon defects in the trial. The absence of a finding of abuse stemmed from the fact that the transcript of the trial was not available for review until after the denial of the first section 2255 motion. 766 F.2d at 1525. Accordingly, the petitioner's inability to access the trial transcript was found by the Eleventh Circuit to constitute an adequate reason for failing to bring the claims earlier, and therefore, not a proper basis for a finding of abuse. *See supra* note 4.

presumptively results in prejudice. *See Hardy*, 375 U.S. at 279-80; *Selva*, 559 F.2d at 1306.

In a direct criminal appeal in which the defendant is represented by counsel other than the attorney at trial, the fact that the new appellate counsel is foreclosed from examining a substantial or crucial portion of the transcript has been held to render illusory the right to appeal. *Hardy*, 375 U.S. at 280. The wisdom underlying that rule is equally applicable to the collateral attack context. An attorney who was present at the relevant proceedings can be expected to be aware of and articulate errors or improprieties. However, the same cannot be said when a defendant is represented on appeal by counsel not involved in the earlier proceeding. In such cases, as in the present one, counsel cannot be expected to be aware of or articulate all bases for error until he has reviewed the entire transcript. *See id.* at 279-80.

In the instant case, Petitioner's counsel on the initial section 2255 motion, who did not represent him at the earlier proceedings, was unable, through no fault of his own, to obtain the transcript of the critical plea proceeding until after the original section 2255 motion was filed.[24] This fact is beyond dispute. Due to these circumstances, Petitioner and his first counsel were unable to assess all bases for section 2255 relief at the time the original section 2255 motion was filed. Given the rationale underlying *Hardy*, prejudice resulting from the court reporter's inability to comply with the Court Reporter Act and to locate the transcripts cannot be imputed to the Petitioner.[25] An abuse dismissal under circumstances such as these strips the 2255 remedy of its

---

[24] *See supra* note 4.

[25] The District Court docket sheet itself evidences the fact that the transcript of Petitioner's plea proceeding was not filed until May 9, 1988, well after Petitioner filed the initial section 2255 motion. (*See* Record Excerpts—District Court Docket Sheet—7).

vitality, and has catastrophic implications for the administration of justice.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

ROBERT FABRIKANT *
FRED D. HEATHER
MARGARET M. ANTINORI
McKENNA & CUNEO
1575 Eye Street, N.W.
Suite 800
Washington, D.C. 20005
(202) 789-7500

ARTHUR BARENS
10209 Santa Monica Blvd.
Los Angeles, CA 90067
(213) 557-0444
Counsel for Petitioner

* Attorney of Record

Dated: April 11, 1991

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8565
Non-Argument Calendar

D. C. Docket No. CR84-349-2A
1:89-cv-2825-RLV

JONATHAN DUNCAN,
Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(January 11, 1991)

Before TJOFLAT, Chief Judge, FAY and ANDERSON, Circuit Judges.

PER CURIAM: AFFIRMED. See 11th Cir. Rule 36-1.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Criminal Action No. CR84-349A

UNITED STATES OF AMERICA

vs.

JONATHAN W. DUNCAN,
Defendant.

ORDER

[Filed May 21, 1990]

This matter is before the court upon Jonathan Duncan's second motion to vacate his sentence pursuant to 28 U.S.C. § 2255. When a defendant presents a second motion pursuant to section 2255, the court must address the new grounds raised in the motion "unless the movant's failure to prosecute these grounds earlier constitutes an abuse of the motion remedy." Humphrey v. United States, 766 F.2d 1522, 1524 (11th Cir. 1985). The government must plead abuse, as it has in the instant case, and then "the burden shifts to the movant to show that his failure to assert the new grounds in an earlier motion does not comprise an abuse." 766 F.2d at 1524. "The movant must prove by a preponderance of the evidence that he was ignorant of facts necessary to support the new ground when the prior motion was filed, or that he had not realized that those facts provided the basis for § 2255 relief." Gay v. United States, 816 F.2d 614, 616 (11th Cir. 1987).

In his current motion Duncan alleges that there is no factual basis for his plea in the record, but that the plea was involuntary because it was part of a "package deal" involving his wife, that he was denied effective assistance of counsel because of a conflict of interest of his attorney, and that the court never actually elicited a guilty plea from him.

Duncan was present at the sentencing and the transcript was later available to him; consequently, all of the facts necessary to support his new grounds were known to him at the time he prosecuted his appeal and at the time he filed his first motion pursuant to section 2255. This court finds that Duncan has failed to prove by a preponderance of the evidence that he was ignorant of the facts necessary to support his new grounds. Therefore, finding that his section motion constitutes an abuse of the writ, the court hereby DENIES the motion.

SO ORDERED, this 18th day of May, 1990.

/s/ Robert L. Vining, Jr.
ROBERT L. VINING, JR.
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-8581

JONATHAN W. DUNCAN,
Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

No. 88-8221

D. C. Docket Nos. 87-1745, 84-349

JONATHAN W. DUNCAN,
Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeals from the United States District Court for the Northern District of Georgia

---

(April 21, 1989)

[Filed Jun. 14, 1989]

Before TJOFLAT and CLARK, Circuit Judge, and ACKER *, District Judge.

---

* Honorable William M. Acker, Jr., U.S. District Judge for the Northern District of Alabama, sitting by designation.

PER CURIAM:

After the limited order of remand was entered by this court on January 3, 1989, the district court conducted an evidentiary hearing to explore the claim of defendant, Jonathan W. Duncan, that his guilty plea was not knowingly and involuntarily tendered and that his adjudication of guilt therefore constituted a violation of Rule 11, F.R.Cr.P., and of the Sixth Amendment. The district court received and considered all relevant evidence that was offered on his issue and made findings of fact and entered conclusions of law, now making it clear that Duncan chose to plead guilty with the knowledge there was a possible risk of triggering a deportation inquiry. The purpose of the remand having been served, the denial of defendant's petition invoking 28 U.S.C. § 2255 is AFFIRMED.

Duncan's separate appeal of his deportation order, a subject not addressed in this court's opinion of January 3, 1989, must now be dealt with.

Appellant contends that the offense of which he was convicted was not "of a conspiracy to violate any law or regulation relating to the illicit traffic in cocaine," contrary to the assertion of the Immigration and Naturalization Service. By pleading guilty to a violation of 21 U.S.C. § 843(b), Duncan confirmed his unlawful use of a communication facility to facilitate the commission of the felony of conspiring to distribute cocaine; and although his involvement may have been indirect and tangential, it was sufficient to authorize an INS inquiry and deportation order. It is difficult to sympathize with Duncan's position after learning for the first time from the recent evidentiary hearing conducted by the district court that Duncan himself waved the red flag and that by committing a DUI offense waked up a sleeping INS. Duncan was apparently the author of his own downfall. Under the circumstances, the deportation order complained of in No. 87-8581 is AFFIRMED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Criminal Action No. CR-84-349 A

UNITED STATES OF AMERICA

vs.

JONATHAN W. DUNCAN

ORDER

[Filed Feb. 1, 1989]

Pursuant to Duncan v. Immigration and Naturalization Service, No. 87-8581 (11th Cir. Jan. 3, 1989), this court held an evidentiary hearing on January 19, 1989 and heard evidence relating to Duncan's motion under 28 U.S.C. § 2255 to set aside his adjudication of guilt on the ground that his guilty plea was not knowingly and voluntarily tendered. Duncan in his section 2255 claim primarily alleges that he was deprived of effective assistance of counsel in that his attorney misled him as to the immigration consequences of his bargained-for guilty plea. He argued that his unaccomplished attorney advised him that a guilty plea to the lesser "communications facility" offense would not expose him to deportation and only for that reason did he plead guilty when he had a good entrapment defense.

The court finds the following facts: Jonathan Duncan is a citizen of New Zealand but has been residing in the United States as a permanent resident alien. In the summer of 1984, Jonathan Duncan and his fiancee, Beth Ellen Chanin, (now his ex-wife), were charged in a two count indictment with conspiracy to distribute cocaine

in violation of 21 U.S.C. § 846 and with distribution of cocaine in violation of 21 U.S.C. § 841 and 18 U.S.C. § 2. Each of these charges carries a maximum penalty of 15 years incarceration Both Duncan and Ms. Chanin, who was by this time his wife, were jointly represented at the arraignment and preliminary hearing by an experienced criminal attorney, Bruce Morris.

After arraignment and initial discussions with the United States Attorney's Office, Mr. Morris advised Duncan that because of a potential conflict of interest between his wife and him in relation to the resolution of the case Duncan should retain independent counsel to represent him in plea negotiations. This case presented a situation where one defendant, Duncan, had arguably a meritorious entrapment defense and because of his lack of a prior record his sentence would likely involve probation as opposed to incarceration. On the other hand, Duncan's wife had no entrapment defense and if convicted Ms. Chanin, who was now pregnant with Mr. Duncan's child, would likely spend some time in jail as other unrelated drug charges were pending against her in the Superior Court of Gwinnett County, Georgia. The United States Attorney's Office had informed Mr. Morris that they considered Duncan and Ms. Chanin a package deal. They would not accept a plea from one unless the other pled as well.

Acting on Mr. Morris' advice, Duncan hired another attorney, T. Henry Clarke, to represent him in the plea negotiations. Mr. Clarke had some experience in criminal law but was primarily a real estate attorney. Clarke was a social acquaintance of Duncan's. Duncan had met Clarke through Ms. Chanin's former husband, Peter Chanin. Clarke was also a friend of Ms. Chanin's father. It was Clarke's and Duncan's understanding that Bruce Morris was to direct the plea negotiations and Clarke was brought in primarily to avoid any appearance of impropriety. Accordingly, Clarke's fee was

greatly reduced and, in fact, he basically considered Duncan's case as pro bono work taken on as a favor to Duncan's father-in-law.

According to both Duncan and Clarke, Duncan had two main priorities which had to be addressed in the plea negotiations. First, Duncan did not want his pregnant wife to serve any jail time and second, Duncan, a New Zealand citizen, would not plead guilty if it would have any adverse immigration consequences. With these objectives in mind, Morris and Clarke worked out an agreement with the Assistant United States Attorney (AUSA) whereby both Duncan and his wife would plead guilty to a lesser charge, serve their sentence on probation and the AUSA would have no objection to the lesser charge being one that had no adverse immigration consequences.

It was, however, up to Duncan and his counsel to determine whether the suggested lesser charge of using a communications facility in furtherance of the commission of a felony involving cocaine would result in deportation. At no time did the AUSA represent or guarantee to Duncan that a plea to the comunications felony would not result in deportation. The AUSA made it clear that she was not certain what the immigration consequences would be and if concerned Duncan's counsel should investigate.

At Duncan's request, Clarke investigated whether the communications charge would impact his immigration status. Clarke spoke with two experienced immigration attorneys, one of whom was suggested by Morris, and Clarke reviewed the statutory authority and case law which the immigration attorneys suggested would control Duncan's situation. Clarke's file on this case was destroyed by the attorneys who purchased his practice a few years ago and he does not recall from memory what specific statutes and cases he relied upon in making his determination.

From his research and his conversations with experienced immigration attorneys, Clarke determined that a plea to the communications felony would probably not have any immigration consequences so long as Duncan avoided any more trouble with the law. It was Clarke's opinion that the communications felony was a "minor felony" and the fact that Duncan was married to a United States citizen and was going to be the father of a United States citizen weighed in his favor if any immigration problem arose due to the plea. Clarke did, however, make it clear to Duncan, while he would probably be alright with the communications plea, Immigration and Naturalization Services ("INS") was unpredictable and there was no guarantee that they would not try to deport him.

Duncan testified at the evidentiary hearing that Clarke advised him he would not have any problem with the INS so long as "he kept him nose clean." Based on this opinion and the fact that the charge had been reduced from two counts which could possibly result in 30 years incarceration to a charge which would allow both Duncan and his wife to only serve 4 years on probation, Jonathan Duncan pled guilty to the charge of using a communications facility to further commission of a felony involving cocaine.

Duncan did not initially have any problems with the INS as a result of his plea. However, one year after his plea, because he had been charged with Driving Under the Influence by State authorities and was brought before this court for probation revocation, his case came to the attention of the INS. The INS instituted a deportation action against him and Duncan discovered that his guilty plea to the communications facility felony because it was considered a drug related crime made him automatically deportable under INS provisions. *See* 8 U.S.C. § 1251. Because the charge fell under the automatic deportation provision, Duncan was not eligible for any

waiver that may have been available to him as a result of marriage to a United States citizen.

Duncan now contends that, because Mr. Clarke did not warn him about this possible consequence, his plea was not voluntary as he would never have pled guilty if he had known it would lead to automatic deportation. On the contrary, the court finds that Mr. Clarke did, indeed, advise Duncan of the potential for deportation as a result of his plea. In fact, Duncan's situation followed the exact pattern that Clarke warned Duncan would subject him to deportation. At the evidentiary hearing held by this court, Duncan testified that Clarke had told him his plea would not result in deportation so long as he "kept his nose clean" during the probationary period. As the evidence showed, the basic plea was not the triggering factor in Duncan's deportation. Duncan failed to follow the rules of his probation, got in trouble with the authorities and as a result his case was brought before the INS. The facts of this case prove that Mr. Clarke's opinion about the deportation consequences of Duncan's plea was accurate.

Duncan makes much of the fact that Clarke mistakenly advised Duncan that a waiver would be available to him even if the INS instituted deportation proceedings as a result of his plea. Clarke testified that he felt because of Duncan's marriage to a United States citizen and his impending fatherhood he would eligible for a waiver. In this opinion, however, Clarke was wrong. The automatic deportation provision for drug related offenses does not allow for waiver. The court finds this error in Clarke's advice to be irrelevant. Although Clarke's advice mischaracterized the availability of a waiver, Clarke's advice accurately presented the possible immigration consequences of Duncan's plea.

Clarke's opinion that Duncan would be entitled to a waiver was based on his marriage to Ms. Chanin and her pregnancy. If, at the time a deportation question arose,

Duncan was not married to a United States citizen or the father of a United States citizen, then the waiver provisions would be inapplicable to his case. So while Duncan was misadvised that waiver was available, he was also aware that waiver was not guaranteed. Waiver would be based on his marital and parental status at the time of deportation not at the time of the plea. The facts of this case show that even if Clarke had been right about the availability of waiver when Duncan pled, it would not have help[ed] his case when the INS began deportation proceedings as he and Ms. Chanin had divorced and Ms. Chanin had suffered a miscarriage of the child she was expecting at the time of his plea.

No one, including Mr. Clarke, promised Duncan he would not be deported. Indeed, Duncan answered in the negative when this court inquired at the Rule 11 hearing whether "anyone has promised you any thing else other than what is in the negotiated plea in this case?" As well, Duncan responded in the negative when asked if he had any understandings or agreements with anyone concerning this case or its outcome. The evidence shows that Duncan was aware that the possibility of deportation as a consequence of his plea existed. While the degree of the risk had been miscalculated, Duncan was aware that there was no foolproof guarantee that pleading guilty would not subject him to deportation. He knowingly chose to run the risk of deportation when he pled guilty to the lesser offense in order to keep his pregnant wife from having to serve time in jail.

Duncan also tries to show ineffective assistance of counsel by arguing that Clarke was not a criminal attorney nor did he have any background in immigration law. The standard for ineffective assistance of counsel is whether trial counsel's conduct was unreasonable and that, but for the failure, the result of the plea proceeding would have been different. Strickland v. Washington, 466 U.S. 668 (1984). Duncan chose his own counsel in this case. He was aware that Clarke was primar-

ily a real estate attorney. Duncan testified at the evidentiary hearing he only hired Clarke to avoid the appearance of impropriety and that everyone understood that he was primarily relying on the advice and experience of Bruce Morris in the defense of his case. Additionally, when Duncan asked Clarke to investigate the immigration consequences of his plea he knew Clarke was not an immigration attorney and would have to rely on the input and advice of more experienced attorneys. The court finds that Clarke's conduct—consulting two experienced immigration attorney's and conducting independent research on the issue—was not unreasonable in this case.

Furthermore, the court finds that Clarke's ultimate opinion about the immigration consequences of a plea to the communications charge was not unreasonable. The evidence presented at the hearing shows that the experienced immigration attorneys who were consulted shared Clarke's opinion that given Duncan's background and his marriage he would not be deported as a result of the plea so long as he stayed out of trouble. The court also notes that Duncan testified that Mr. Morris upon whom he was relying as primary counsel agreed with Clarke's conclusion that he would have no problem as a result of the plea so long as he stayed out of trouble and that given the dual goals of keeping his wife out of jail and avoiding deportation, the communications charge was the best possible deal that could be worked out for both Duncan and his wife. While he ran the risk of deportation if he failed to stay clean, Duncan, his wife, and their unborn child avoided the risk of a guilty verdict and up to 15 years incarceration on each of the two counts of the indictment.

In order to show that Clarke acted unreasonably, Duncan points the court to the case of Chang-Salazar v. Immigration & Naturalization Service, 564 F.2d 302 (1977) wherein the Ninth Circuit held that the crime of using a communications facility to facilitate the com-

mission of a felony involving cocaine fell into the category of automatically deportable crimes. Clarke testified that he did not recall seeing this case and Duncan argues that if Clarke had found the case he would have known his opinion was wrong, would have changed his advice and Duncan would not have pled guilty. *Chang-Salazar* shows that at the time of Duncan's plea one circuit had specifically reached the question presented by Duncan's case but it does not suggest that the issue was a settled matter of law in the Eleventh Circuit where Duncan was being charged. The existence of one opinion which differs from the conclusion reached by all the attorney's consulted in Duncan's case does not render Clarke's conduct unreasonable; especially in light of the fact that the case has no precedential value in the Eleventh Circuit where Duncan was charged.

This court concludes that Duncan was not misled about the immigration consequences of his plea by Clarke and that Clarke's conduct in researching the immigration consequences of Duncan's plea and his opinion based on that research was not unreasonable and did not constitute ineffective assistance of counsel so as to render Duncan's plea involuntary in violation of F.R.Cr.P 11 and the Sixth Amendment of the Constitution of the United States. Accordingly, Duncan's motion to set aside his guilty plea on the basis that it was involuntarily entered into is DENIED.

SO ORDERED, this 1st day of February, 1989.

/s/ Robert L. Vining, Jr.
ROBERT L. VINING, JR.
United States District Judge

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-8581

JONATHAN W. DUNCAN,
Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

No. 88-8221

JONATHAN W. DUNCAN,
Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeals from the United States District Court for the Northern District of Georgia

---

(January 3, 1989)

Before TJOFLAT and CLARK, Circuit Judges and ACKER*, District Judge.

---

* Honorable William M. Acker, Jr., U.S. District Judge for the Northern District of Alabama, sitting by designation.

PER CURIAM:

We consider two consolidated appeals by Jonathan W. Duncan. Duncan first appeals from an order of the Board of Immigration Appeals deporting him to New Zealand upon a finding that he is guilty of a crime "related to a controlled substance" as a result of his plea of guilty to the use of a communication facility in furtherance of the commission of a felony involving cocaine. Duncan also appeals from the district court's denial of Duncan's petition filed under 28 U.S.C. § 2255, seeking to have his adjudication of guilt vacated on the ground that his guilty plea was not knowingly and voluntarily tendered and that his adjudication of guilt therefore constituted a violation of Rule 11, F.R.Cr.P., and of the Sixth Amendment to the Constitution of the United States. Duncan's primary contention in this regard is based upon his secondary allegation that he was deprived of effective assistance of counsel in that his attorney misled him as to the immigration consequences of the bargained-for guilty plea. He charges that his unaccomplished attorney advised him that a guilty plea to the lesser "communication facility" offense would not expose him to deportation and that only for that reason did he plead guilty when he had a good entrapment defense.

It is clear that the deportation order depends entirely upon Duncan's adjudication of guilt in the district court. If the guilty plea is vacated, the deportation order will necessarily be set aside. However, if the guilty plea is not vacated but was nonetheless entered according to Duncan's version of the facts, the legal issues discussed in *Downs-Morgan v. United States*, 765 F.2d 1534 (11th Cir. 1985), and relied upon by both parties on the appeal of the deportation order, will remain to be decided by this court.

The district court did not conduct an evidentiary hearing on Duncan's § 2255 petition. Therefore, neither the district court nor this court has any evidence bearing on the questions raised by Duncan except the tran-

script of the Rule 11 hearing itself. Duncan argues that the Rule 11 hearing does not tell the whole story. This court finds that an evidentiary hearing on Duncan's § 2255 petition should have been held so that if there is more to the story than meets the eye from the Rule 11 hearing, it can be told and judicially evaluated.

This court retains jurisdiction over both appeals but REMANDS the § 2255 proceeding to the district court for the limited purpose of the district court's conducting an evidentiary hearing within forty-five (45) days of this date, entering findings of fact and conclusions of law addressing and deciding Duncan's allegations of ineffective assistance of counsel as it may bear on the knowing and voluntary nature of his guilty plea and on the prejudice, if any, which may have resulted from any mistaken belief held by Duncan. After the district court's findings and conclusions in this regard are received by this court, the parties to the § 2255 proceeding shall within fourteen (14) days thereafter file supplementary briefs, that is, *unless* the district court vacates Duncan's guilty plea, in which event it will be incumbent on the United States to decide whether to take its own appeal or to acquiesce in the district court's decision and proceed to trial on the original indictment.

Accordingly, the district court's denial of Duncan's § 2255 petition is VACATED and the cause REMANDED for the proceedings outlined above.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Criminal Action No. CR 84-349 A

UNITED STATES OF AMERICA

vs.

JONATHAN DUNCAN

ORDER

[Filed Mar. 7, 1988]

On July 30, 1985, Jonathan Duncan entered a negotiated plea of guilty to a one-count information charging him with using a communication facility in facilitating the commission of acts in furtherance of a conspiracy to distribute cocaine. Imposition of sentence was suspended, and Duncan was placed on probation for four years. Duncan has now filed a motion under 28 U.S.C. § 2255 seeking to have his sentence vacated on the ground that his guilty plea was not knowingly and voluntarily entered into. The basis for this contention is that Duncan's attorney misled him about the consequences of a guilty plea, specifically telling him in answer to Duncan's repeated inquiries that a guilty plea would not result in his deportation. Duncan's attorney was incorrect, and deportation proceedings have now been instituted against Duncan.

In Downs-Morgan v. United States, 765 F.2d 1534 (11th Cir. 1985), the Eleventh Circuit addressed the precise issue presented in this case and that case held that under certain circumstances an affirmative misrep-

resentation by counsel in response to a specific inquiry regarding the possibility of deportation or exclusion could warrant setting aside a guilty plea. In that case the defendant contended that if he were deported to Nicaragua he would certainly be imprisoned for many years and possibly even be executed by that country. Although the Eleventh Circuit remanded for an evidentiary hearing in *Downs-Morgan* to determine if the attorney did, in fact, give his client erroneous information regarding deportation, the court also was very careful to point out that it was dealing with unique circumstances and that its holding was very narrow:

> We emphasize the narrowness of our decision. We do not hold that the district court is under any obligation to inform the defendant about possible immigration consequences or that the court's failure to do so affects the constitutionality of a guilty plea. Nor do we suggest that an affirmative misrepresentation by counsel in response to a specific inquiry about the possibility of deportation or exclusion, without the additional factors of imprisonment and execution, is sufficient to warrant collateral relief.

765 F.2d at 1541, n. 15.

In the instant case Duncan has not alleged that he faces imprisonment or execution upon his deportation to New Zealand. Consequently, he is not entitled to have his sentence set aside.

For the foregoing reasons, Duncan's motion under 28 U.S.C. § 2255 is DENIED.

SO ORDERED, this 4th day of March, 1988.

/s/ Robert L. Vining, Jr.
ROBERT L. VINING, JR.
United States District Judge